Exhibit D

Excerpts of *Markman* Hearing Transcript (September 5, 2007)

ESQUIRE DEPOSITION SERVICES

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 07 CV 3302 (KMK)(LMS)

MEDTECH PRODUCTS, INC.,)

Plaintiff,)

v,)

DENTEK ORAL CARE, INC.,)

Defendant,)

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MEDTECH PRODUCTS, INC.,)

Plaintiff,)

v.)

POWER PRODUCTS, INC.,)

Defendant.)

AUDIO RECORDING TRANSCRIPTION OF the HEARING before MAGISTRATE MARGARET SMITH, September 5, 2007.

TRANSCRIBED BY: ANNETTE M. MONTALVO, CSR, RMR,

RMR CERTIFICATE NO. 833506.

Q. How many times?
A. I have testified all together maybe seven or eight times, and probably two or three or four of those occasions had to do with plastics and resins. Maybe 4 or 5.
MS. SPEED: Your Honor, we would move for Mr. Stern to be admitted as an expert in resins in this case.
MR. CHENG: Your Honor, a brief voir dire, please.
THE COURT: Sure.

EXAMINATION

BY MR. CHENG:
Q. Good afternoon, Mr. Stern.
A. Same to you.
Q. I believe you testified you have a bachelors degree in chemical engineering, is that right?
A. Correct.
Q. And when did you receive that degree?
A. 1972.
Q. And what kind of courses did you take to receive that degree?
A. Actually, I don't know if you are

familiar with Cooper Union, but at the time that I went there, Cooper Union was a rather unique institution in that it crammed five years of engineering training into a four-year program. It did so rather successfully. I think at the time I was there, Cooper Union was rated in the top 3 engineering schools in the country. So the kinds of courses I took were largely related to chemistry and chemical engineering. There was a requirement that every student take one course per semester not related to chemical engineering and chemistry, which were affectionally called humanities courses. So I think this was a program of, I don't know, 18 or 19 credits per semester times 8 semesters, and I think we graduated with 140 some odd credits with a very, very specific focus on chemistry and chemical engineering.

Q. Mr. Stern, did you take any classes on chemical testing or physical analysis of materials while an undergraduate?

A. Sure. Yes.

Q. Have you taken any such courses after you graduated?

A. No.
Q. So since graduating in 1972, that's over 30 years ago, you haven't taken a single course in chemical testing or physical analysis?
A. I did not.
Q. And you didn't pursue any graduate work in chemistry or chemical engineering, right?
A. I did not.
Q. And you haven't conducted any research in the last 30 years since graduating from Cooper Union, chemical testing of physical analysis of materials?
A. Actually, that's not correct. I was managing partner of a consulting company called Chem Systems with whom I was associated for about 20 years, and Chem Systems actually had an R&D lab located in New Jersey. The focus of the R&D that we did was largely a process related rather than product related. But it included, elements of both.
Q. You didn't conduct the R&D yourself, did you?
A. I did not conduct the R&D myself, that is correct.

Q. And you are not an inventor of any patents?

A. I am not.

Q. You said you -- I think you testified earlier that you had 35 years experience in chemical engineering and that you could not testify that you had been practicing chemical engineering for the last 35 years; is that correct?

A. Well, it's a question of how you define chemical engineering, and I think most people define chemical engineering as people that design chemical plants. I haven't designed chemical plants in 30 years. But there's a lot more to chemical engineering than designing chemical plants, as I am sure you know, and assuming again it gets back to chemical products, chemical processes, and chemical production technology, and those are areas that I am very conversant with.

Q. Have you actually designed chemical products?

A. Oh, sure.

Q. Have you designed a product called

resins?
A. No.
Q. Have you designed any products involving molding techniques?
A. No.
Q. Have you been affiliated with molding techniques like injection molding?
A. Generally, yes.
Q. But you haven't studied that?
A. Aside from studying it 35 years ago in college, no.
Q. You testified that you gave presentations regarding resins, right?
A. Yes.
Q. And you gave them to the industry?
A. Yes.
Q. And what do you mean by "the industry"?
A. The American Institute of Chemical Engineers conducts annual meetings where -- teachers people that attend a whole variety of things related to chemical products and resins. There are lots of other kinds of industry groups that are concerned about resins in general and the resin business. I have addressed groups like

that. I used to teach a course on the chemical industry, part of which was associated with resins.

But, again, let's be clear. When I talk about resins, I am talking about not just process technology for making resins, but the economics of making resins, the commercial elements of the business supply demands, the pricing for products, strategic elements of being in business, merger and acquisition deals and how they affect the business.

Q. These presentations, though, didn't involve the design and manufacture of any product called resins?

A. No.

Q. I believe you also said you testified several times regarding the topic of resins, two to four times; is that right?

A. I think so right.

Q. Was the scope of your testimony namely related to the design or manufacture of any products that involve resins?

A. Certainly the manufacture of products, but not the design and manufacture.

Q. And you testified actually to how a product was being manufactured?

A. Partially, yes.

Q. In what way?

A. Well, the production technology of, let's take some examples, polyethylene, polystyrene, polypropylene, PVC, are not universal. Different companies have different methods, some of which they license, some of which they don't. The ability to understand those manufacturing processes and compare them is a fairly significant item of contention in the chemical industry. And so I am familiar with those things and have talked about them in litigation and other audiences.

Q. But your testimony has not been about molding techniques?

A. No.

Q. You say you have been a consultant and you're currently a managing director of LECG; is that right?

A. Correct.

Q. And LECG is a consulting firm?

A. Yes.

Q. And would you say the consulting work has been about business initiatives and endeavors in the chemical industry?

A. Well, part of it, yes.

Q. And would it by helping companies with their strategic claim, for example?

A. Partially, yes.

Q. Business development opportunities?

A. Yes.

Q. It would not be about advising people how to design their products?

A. I would say no.

Q. Okay. Or about how to manufacture product involve resins?

A. Correct. I don't do that at LECG.

Q. Not about what molding techniques?

A. No.

Q. So you know a lot about the business side of -- would it be fair to say you know a lot about the business side of chemical industry as you described it, but you haven't actually worked with the materials themselves in the past 30 years?

A. I think that's -- with all due respect,

I think that is a fairly narrow view of what I have done over the past 35 years.

Q. Have you ever actually worked with the materials themselves?

A. No.

MR. CHENG: Your Honor, at this time, DenTek would move, actually, with all due respect to Mr. Stern, to exclude him testifying. He is not an expert skilled in the art of resins, in any way that would help this Court understand the claim construction issues that bear here.

So under Rule 702 of the evidence rules as well as Daubert, we would move to exclude him.

THE COURT: Ms. Speed?

MS. SPEED: Your Honor, the expert in claim construction is offered to explain the underlying science. In this case, your Honor, Mr. Stern is offered to explain the underlying science, which is very clear and with which he has a background of education and experience in. Your Honor, he is not offered in order to teach the Court or to offer expert opinions on abstract molding concepts. That's not what's at issue here, your Honor.

for these specific characteristics, hit "enter," and all the sudden you get a listing of the materials that would satisfy that.

That's commensurate with what this patent teaches, your Honor, and Mr. Stern has been offered to guide the Court not in understanding new and high science, but, instead, he's been offered to instruct the Court on what the state of the science was to one of ordinary skill in the art when the patent application was filed, which is something that under Phillips he is permitted and he is experienced and he is qualified to do.

MR. CHENG: Your Honor, if I may be heard for a moment.

Claim 17 which is at issue here is a method of fabrication. It is a manufacturing claim. It's a process which Mr. Stern, with all due respect, does not have experience in, and with respect to, you know, the topics that opposing counsel has mentioned, she mentioned physical characteristics of resins and how they interact, but Mr. Stern is not skilled in that area. He hasn't consulted or provided --

(WHEREUPON, there was a short interruption in the audio recording while the tape was changed.)

MR. CHENG: -- years on the design and fabrication of any products involved with resins or plastics, and he is not in a position to identify classes of resin taht would satisfy the patent claim limitations. And, finally, with respect to whether or not he's a person of ordinary skill in the art, you know, our expert report -- I mean, Dr. Rancourt's expert report specifically says that the hypothetical person of ordinary skill in the art would have an undergraduate degree with five to ten years industry experience and be versed in the following: Mechanical design, which Mr. Stern does not have, molding technique, which he doesn't have, and chemical analysis of business, which he also doesn't have.

So I think he really is not qualified to be speaking in any way to help this Court understand the claim limitations in the context of the lawsuit.

THE COURT: I understand the objection. I think in the context of this hearing, where I if I consider expert testimony at all, I consider it with a great deal of hesitation. The objections which have been interposed certainly go to the weight, which would be afforded any testimony from Mr. Stern. But for purposes of this proceeding and this proceeding only, I will overrule the objection an allow Mr. Stern to testify as an expert.

MS. SPEED: Thank you, your Honor.

EXAMINATION (Resumed)

BY MS. SPEED:

Q. Mr. Stern, in your education and experience, do you understand what the term "resin" means to one that is actually engaged in the business of resins?

A. I think so.

Q. And how do you know what the term resin means to one of ordinary skill in the art such as yourself or others?

A. Well, we will go back to basic principles of what comprises resin. A resin can be a natural or synthetic compound or substance,

claim and silent to the material that should be used. What it is is also containing some of the information from claim 1, which is the other claim directed to the structure of the device, the appearance of the device.

And so, your Honor, we submit that the reasons for allowance has no bearing whatsoever on this case and should be ignored in construing the claim of -- the method claim of claim 17.

And I would like to point out that it is pretty much on time. Thank you, your Honor.

MR. SHALEK: Your Honor, it is late, and by way of rebuttal, I would really just like to address one point relating to approximately 30 percent, if I may.

THE COURT: Sure.

MR. SHALEK: And I don't expect more than a few minutes here.

What Mr. Stern testified in effect is that if we take a look at the second limitation in claim 17, which calls for an impression preform comprising an ethylene vinyl acetate copolymer having approximately 30 percent by weight, that what we really should be doing is

not looking to the words of the claim "approximately 30 percent," but instead we should be looking to any vinyl acetate compound that is a Shore A hardness less than 80 and a Vicat softening temperature less than 70. And at the top of -- at the paragraph that bridges the two pages of this report this is effectively what he says: A person of ordinary skill in resins would understand to make the device patent. The base must be constructed of a resin that is harder and can withstand higher temperatures than the preform. So that would mean that the Shore A hardness would have to be less than 80 and the Vicat less than 70.

Now, if we go to what I think has been marked as Exhibit 5, which is this typical physical properties and Elvax, on the second page, all the Elvax compounds that are 25 percent EVA have Shore hardness which is 87 and 83. So an Elvax compound that is 25 percent vinyl acetate would be too hard to be included within section B of the patent, even though Mr. Stern testified that he would include them.

So there is a glaring inconsistency in

his testimony there, particularly when the patent says that the EVA content has to be at least 25. So if the patent is saying you can use 25, and the hardness that's specified here is 87 and 83, Mr. Stern can't be right that the hardness must be less than 80.

And more to the point, your Honor, the inventor is allowed to claim his invention the way he wants to claim it. In talking about the base, the inventor talked about Shore A hardness and about Vicat softening temperature. In claiming the impression preform, the inventor talked about the vinyl acetate content and claimed approximately 30.

The inventor certainly knew how to say that there should be some characteristic of the impression preform relating to Shore A hardness or Vicat softening if the inventor chose to make those parameters, but the inventor chose not to. And this is a classic case of a plaintiff trying to rewrite clear claim language, perhaps not so clear because of the ambiguity about "approximately," but clear in the sense that it talks only about vinyl acetate into what the

plaintiff now wishes the claim had been written, something having to do with Shore A hardness and Vicat softening.

And we have cited in our reply brief the Chef and the Lamblesta case (phonetic), the black letter law that the plaintiff has to take the claim as written and can't rewrite it after the fact.

Thank you, your Honor. We thank the court for its time and attention.

THE COURT: My pleasure.

MS. SPEED: Your Honor, may I address that point? And I think I can do it in 2 minutes.

When we refer back to Mr. Stern's report, which I believe is Exhibit 5 of the plaintiff.

THE COURT: Yes.

MS. SPEED: If we look at the last page, what it states, your Honor, in the last paragraph is that a person of ordinary skill in resins would know that the preform resin must contain vinyl acetate as stated in claim 17, but a person of ordinary skill in the art of resins would also understand that the amount of vinyl acetate used